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In The
Supreme Court of the United States

RICKY HENSON, ET AL., PETITIONERS

v.

SANTANDER CONSUMER USA INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE AS AMICI CURIAE SUPPORTING RESPONDENT

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Rhodes v. U.S. Bank Nat'l Ass'n, ___ F. Supp. 3d ___, 2017 WL 770941 (E.D. Pa. Feb. 27, 2017) 22

Schlosser v. Fairbanks Capital Corp., 323 F.3d 534 (7th Cir. 2003).....15, 16

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Zagorski v. Midwest Billing Servs., Inc., 128 F.3d 1164 (7th Cir. 1997) (per curiam) 21

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15 U.S.C. § 1692k(a)(2)(A) 21

15 U.S.C. § 1692k(a)(2)(B) 21

15 U.S.C. § 1692k(a)(3) 21

OTHER AUTHORITIES

Consumer Fin. Prot. Bureau, *Fair Debt Collection Act: CFPB Annual Report 2016* (Mar. 2016) 22

Edward I. Altman et al., *Bank Debt versus Bond Debt: Evidence from Secondary Market Prices*, 42 J. of Money, Credit & Banking 755 (2010) 11

TABLE OF AUTHORITIES—Continued

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Fed. Deposit Ins. Corp., *Quarterly Banking Profile: Fourth Quarter 2016* 10

Fed. Deposit Ins. Corp., *Risk Management Manual of Examination Policies* (Sept. 2016) ...11, 12, 13

Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* (Jan. 2013) 25

George E. Pennacchi, *Loan Sales and the Cost of Bank Capital*, 43 J. of Fin. 375 (1988).....13

H.R. Rep. No. 95-131 (1977) 7, 9

Jerry D. Brown, *Painting a Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time*, 53 Consumer Fin. L.Q. Rep. 42 (1999).....19

Laurie A. Lucas & Alvin C. Harrell, *2000 Update on the Federal Fair Debt Collection Practices Act*, 55 Bus. Law. 1453 (2000).....20

Laurie A. Lucas et al., *Say What You Mean: The FDCPA and Problems of Interpretation*, 68 Bus. Law. 659 (2012) 20

Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Mar. 12, 2017).....23

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Office of the Comptroller of the Currency, *Concentrations of Credit* (Dec. 2011) 12

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Office of the Comptroller of the Currency, *Rating Credit Risk: Comptroller's Handbook* (Apr. 2001) 12

Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity*, 23 J. Fin. Research 197 (2000) 11, 12

Robert M. Hunt, *Collecting Consumer Debt in America*, Phila. Fed. Reserve Bank Bus. Rev. 11 (Q2 2007) 8

Rustom M. Irani & Ralf R. Meisenzahl, *Loan Sales and Bank Liquidity Risk Management: Evidence from a U.S. Credit Register*, FEDS Working Paper No. 2015-001 (2015) 10

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Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, Mercatus Working Paper (Sept. 2015) 17

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN FINANCIAL SERVICES ASSOCIATION, AND FINANCIAL SERVICES ROUNDTABLE AS AMICI CURIAE SUPPORTING RESPONDENT

The Chamber of Commerce of the United States of America, American Financial Services Association, and Financial Services Roundtable respectfully submit this brief as amici curiae in support of respondent.[1]

INTERESTS OF AMICI CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It directly represents approximately 300,000 members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in this Court in cases raising issues of concern to the Nation's business community.

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[1] Letters from the parties providing blanket consent to the filing of amicus briefs are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

The American Financial Services Association ("AFSA"), founded in 1916, is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA has a broad membership, ranging from large international financial services firms to single office, independently owned consumer finance companies. The association represents financial services companies that hold leadership positions in their markets and conform to the highest standards of customer service and ethical business practices. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

The Financial Services Roundtable ("FSR") represents 100 of the largest integrated financial services companies providing banking, insurance, and investment products and services to the American consumer. FSR member companies provide fuel for America's economic engine, accounting directly for $98.4 trillion in managed assets, $1.1 trillion in revenue, and 2.4 million jobs.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act ("FDCPA" or "Act") is not a catch-all regulatory regime for any party that collects debts. Instead, it targets only carefully defined categories of "debt collectors." As relevant here, an entity is a debt collector if it "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due *another*." That definition unambiguously excludes parties who collect on debt that they own. Such debt is obviously not owed or due *another*.

The FDCPA's history and purpose confirm what the statutory text plainly provides. The legislative history makes clear that the Act was intended to cover independent debt collectors—third parties that collect debts owed to someone else. Members of Congress pointed to evidence that existing state and federal laws were insufficient to address complaints about independent debt collectors' collection activity. And members consistently distinguished those independent collectors from the types of parties that, by design, would *not* be covered: banks, retailers, credit unions, and finance companies.

Yet petitioners' reading of the FDCPA would sweep in such companies, despite the care Congress exercised in excluding them. Through a contorted reading of *exceptions* to the general definition of debt collector, petitioners would extend the FDCPA to reach financial institutions that purchase portfolios of debt

in the ordinary course of business, a small portion of which may be in default, and then collect on the loans for their own accounts.

This expansion of the FDCPA's coverage would have dramatic negative consequences. It would extend the FDCPA to many banks and consumer finance firms that primarily act as lenders. These firms regularly buy and sell loans to increase liquidity, manage risk, and satisfy regulated capital requirements. When these institutions buy and sell loan portfolios, some individual loans within them will inevitably be in default at the time of purchase. Whether a loan is considered to be in default depends on a web of crisscrossing state and federal laws, individual loan contract terms, the status of loan payments, and more. Without a cost-prohibitive loan-by-loan review, there is thus no realistic way to screen out defaulted loans even if a purchaser wanted to.

Under petitioners' reading of the statute, the inevitable presence of defaulted loans in a portfolio transforms the purchaser into an FDCPA debt collector—not just for those loans but for *all* of the purchaser's loans, including the ones it originated. That in turn would drive up the cost of credit for consumers and chill the critical secondary market in loans, which plays an indispensable role in sound financial management practices.

There is one group that would benefit from petitioners' interpretation, albeit not one petitioners might be willing to acknowledge. Expanding "debt

collector" to include traditional consumer finance companies would embolden a growing cottage industry of vexatious FDCPA litigation. The FDCPA's numerous technical requirements have allowed enterprising plaintiffs and their attorneys to spin innocent and unavoidable infractions into large awards, mostly for the benefit of the attorneys. Nearly one out of every eight private statutory actions filed in federal district court in 2015 was an attempt to recover under the Act. Expanding the FDCPA to cover lenders like Santander would further clog the federal courts' dockets with FDCPA litigation, with little or no benefit for consumers.

ARGUMENT

Petitioners' interpretation of the FDCPA defies its plain text and untethers the statute from Congress's purpose in enacting it. Their reading would result in a dramatic expansion of the FDCPA's net to snare a range of financial institutions that bear little resemblance to the specialized debt-collection entities Congress intended the statute to cover. That in turn would chill the critically important secondary market for loans and increase the cost of credit to consumers. The only beneficiaries would be FDCPA plaintiffs' attorneys, who would acquire new targets for vexatious litigation under the statute. The court of appeals' judgment should be affirmed.

I. PETITIONERS' INTERPRETATION OF THE FDCPA CONFLICTS WITH THE STATUTE'S TEXT, HISTORY, AND PURPOSE

The FDCPA does not apply to every person who collects a debt. Instead, the statute covers parties whose principal business purpose is debt collection or who regularly collect debts for others. There is no support in the Act's text, history, or purpose for extending the statute to cover traditional consumer lenders, like Santander, whose principal purpose is not debt collection and who buy loans and collect on them for their own accounts.

1. Congress drafted the FDCPA to apply to only "debt collectors." As relevant here, an entity is a debt collector if it (1) "uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts" or (2) "regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). This case involves the scope of the second definition.

Respondent demonstrates how the statute's text and structure squarely answer the question presented here. Resp't Br. 15-24. Simply put, an entity that collects debts that it owns is not collecting a debt "owed or due or asserted to be owed or due *another*." 15 U.S.C. § 1692a(6) (emphasis added). That is enough to resolve this case. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (when a statute's language is plain, statutory interpretation begins and ends "with

the language of the statute itself" (quotation marks and citation omitted)).

2. Given the text's clarity on this point, it is not surprising that the contemporaneous legislative record confirms that Congress limited the Act's coverage to a specific class—parties whose primary purpose is collecting debts or who regularly collect debts *for others*. Both the Senate and House reports accompanying the final bill focus on independent debt collectors. S. Rep. No. 95-382, at 2 (1977); H.R. Rep. No. 95-131, at 6-7 (1977). That was because Congress understood that "independent debt collectors constitute an industry separate from creditors"—that is, separate from traditional consumer lenders, such as banks. H.R. Rep. No. 95-131, at 6-7. Hearings showed that "independent debt collectors are the prime source of egregious collection practices." S. Rep. No. 95-382, at 2; *see* H.R. Rep. No. 95-131, at 25 (Rep. Mark Hannaford explaining that "evidence is available only as to abuses by third-party rather than in-house collection agents"); *see also* 15 U.S.C. § 1692 (congressional findings on such abusive practices).

Congress pointed to several reasons why independent debt collectors warranted special attention. First, the scale and number of such entities made enforcement actions by federal regulators less likely to "change industrywide practices" than would be the case with actions against larger entities like banks and finance companies. H.R. Rep. No. 95-131, at 7.

Second, independent debt collectors at the time also offered no consumer-facing products or services that would create a longer-term relationship with consumers, thus providing less of an incentive to maintain strong reputations among consumers. On the other hand, Congress understood that financial institutions repeatedly interact with consumers and therefore generally have a stronger interest in avoiding conduct that might alienate present or future customers. S. Rep. No. 95-382, at 2.

Finally, unlike financial institutions, independent debt collectors were not already subject to oversight from other federal regulatory regimes, such as those governing depository institutions. Robert M. Hunt, *Collecting Consumer Debt in America*, Phila. Fed. Reserve Bank Bus. Rev. 11, 20 (Q2 2007) (explaining importance of this rationale at time of enactment of the FDCPA).[2]

Against the backdrop of this record, the FDCPA committee reports were explicit about which parties the Act would and would not cover. Subject to the Act's express exclusions, the Act would "cover all third persons who regularly collect debts *for others*." S. Rep. No. 95-382, at 3 (emphasis added). Conversely, the statute would not extend to "any person who does not directly or indirectly collect or attempt to collect a debt owed or due or asserted to be owed or due another and who engages in any business the principal purpose of which

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[2] *Available at* https://tinyurl.com/collectingconsumerdebt.

is other than the collection of debts, *such as banks, retailers, credit unions or finance companies*." H.R. Rep. No. 95-131, at 4 (emphasis added).

II. PETITIONERS' INTERPRETATION WOULD HARM CONSUMERS BY THREATENING A BROAD RANGE OF LENDERS WITH FDCPA LIABILITY

Notwithstanding the FDCPA's plain text and consistent legislative record, petitioners insist that the statute should be construed to cover the "debt buying industry," which specializes in "'purchas[ing] defaulted debt from original creditors' for pennies on the dollar" and turning those purchases into profits through aggressive collection tactics. Pet'rs Br. 8 (quoting *Consumer Fin. Prot. Bureau, Fair Debt Collection Practices Act: CFPB Annual Report 2014* (Mar. 2014)). But there is no need to contort the statutory language to encompass those entities. The FDCPA's first definition of "debt collector" already covers them—the collection of debts is their "principal purpose." 15 U.S.C. § 1692a(6).

Petitioners' expansion of the FDCPA's coverage would instead hit a different group altogether: diversified financial institutions like Santander that buy and sell debts as part of sound financial management. That reading would unnecessarily make these prudent measures more expensive, ultimately driving up the cost of credit to consumers without any corresponding benefit to anyone other than FDCPA plaintiffs' lawyers.

A. Financial Institutions Buy And Sell Loans For Many Different Reasons, And Consumers Benefit From This Activity

Buying and selling loans is an important part of a healthy credit market. Most of these sales look nothing like the "pennies-on-the-dollar" transactions on which petitioners focus. Originating lenders sell loans that they originate, rather than keep them until maturity, for many reasons related to sound financial management. And other lenders buy those loans, rather than hold only loans they originate, for many of the same reasons.

Scholars refer to this activity as the "secondary market" for loans. *E.g.*, Rustom M. Irani & Ralf R. Meisenzahl, *Loan Sales and Bank Liquidity Risk Management: Evidence from a U.S. Credit Register*, FEDS Working Paper No. 2015-001, 1 n.2 (2015).[3] That market can include both commercial and consumer loans, and the total volume of trading can be enormous—in 2016 it exceeded $486 billion. Fed. Deposit Ins. Corp., *Quarterly Banking Profile: Fourth Quarter 2016* 13.[4] Little of this activity is of the pennies-on-the-dollar variety highlighted by petitioners. Instead, the vast majority of buyers of these loans pay 90% or more of a

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[3] *Available at* https://tinyurl.com/irani-loan-sales.

[4] *Available at* https://tinyurl.com/fdic-quaterly-banking-profile. The actual volume is likely larger because the Quarterly Report data reflects only sales where the seller has offered some enhancement to the buyer to reduce the buyer's risk in the case of non-performance, such as recourse against the seller or a third-party insurer. *Ibid.*

loan's face value. Edward I. Altman et al., *Bank Debt versus Bond Debt: Evidence from Secondary Market Prices*, 42 J. of Money, Credit & Banking 755, 758 (2010).[5] Buying and selling loans helps financial institutions efficiently meet their customers' needs in a variety of ways.

First, the buying and selling of loans helps lenders meet demand for new loans. To state the proposition simply, a lender can extend new credit only if it has funds to lend. Some lenders may experience more demand for new credit than they can meet with existing funds. Rebecca S. Demsetz, *Bank Loan Sales: A New Look at the Motivations for Secondary Market Activity*, 23 J. Fin. Research 197, 200-01 (2000). Others may have an abundance of cash reserves. *Ibid.* When a lender with excess demand sells some of its loans to a lender with excess funds, the seller gets new funds that it can use to offer new credit. *Ibid.* Buying and selling loans thus helps lenders manage their liquidity as supply and demand for different types of credit change over time. *Ibid.*; Fed. Deposit Ins. Corp., *Risk Management Manual of Examination Policies* 6.1-7 (Sept. 2016) [hereinafter *Risk Management Manual*].[6] This helps keep credit costs for consumers low and improves credit availability. Irani, *supra*, at 1-3.

Second, the buying and selling of loans allows lenders to reduce risks by maintaining a diverse portfolio of assets. For example, if a local lender keeps all

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[5] *Available at* https://tinyurl.com/bank-vs-bond-debt.

[6] *Available at* https://tinyurl.com/risk-mgmt-manual.

its originated residential mortgages until maturity, a drop in local housing prices could place the lender at significant risk of simultaneous defaults across multiple mortgages. Demsetz, *supra*, at 200-01 (explaining how banks "use loan sales and purchases to rebalance a portfolio of a given size"). Such phenomena, often called "concentrations of credit," "have been key factors in banking crises and failures." Office of the Comptroller of the Currency, *Concentrations of Credit* 1 (Dec. 2011).[7] Thus, a properly executed strategy of selling some loans with similar risk exposures and buying others with a different risk profile can help a lender reduce the risk of a catastrophic failure. Demsetz, *supra*, at 200-01; *Concentrations of Credit* at 12-13.

Third, the buying and selling of loans assists lenders (especially banks) in meeting capital requirements. Capital requirements ensure that a lender's ratio of equity to debt stays within healthy limits. Such requirements are heavily regulated and satisfying them is a crucial part of sound risk management. *E.g.*, *Risk Management Manual* at 2.1-2.

Loans are assets on a bank's balance sheet and are risk rated under banking regulations. *Id.* at 3.2-2. Lenders assign a risk rating based on a loan's characteristics, such as credit concentration, borrower characteristics, and the status of a loan's performance. *Id.* at 2.1-4; Office of the Comptroller of the Currency, *Rating Credit Risk: Comptroller's Handbook* 13-20 (Apr.

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[7] *Available at* https://tinyurl.com/occ-concentrations.

2001).[8] High-risk loans with high-risk ratings require a bank to hold additional capital. *Risk Management Manual* at 2.1-3—2.1-5. A given loan's risk rating also may change over time based on market conditions, a borrower's performance, and other factors. *Ibid.* Banks and other lenders must monitor the loans they hold and ensure that, even as risk ratings change, the lenders' overall holdings and liabilities satisfy regulated capital requirements. For decades, banks have bought and sold loans to help them meet these requirements through adjusting the mix of loans that they hold. *E.g.*, George E. Pennacchi, *Loan Sales and the Cost of Bank Capital*, 43 J. of Fin. 375, 375-76 (1988).

Empirical studies show that such practices reduce credit costs, benefiting consumers. *Ibid.* For example, it can often be cheaper to sell a portion of a lender's loan portfolio to pay down debts than to raise equity through other means, like through attracting more traditional deposits. *Id.* at 382-83. And lenders price those savings into the costs of extending credit to consumers. *Ibid.*

B. Standard Loan Sales Will Inevitably Include Some Loans In Default

When lenders buy and sell portfolios of loans, those portfolios will almost certainly include some loans in default, as occurred here. Indeed, even if a purchaser wished to exclude loans in "default" from the portfolio to avoid classification as an FDCPA "debt

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[8] *Available at* https://tinyurl.com/occ-rating-credit-risk.

collector" under petitioners' interpretation, it would be difficult, if not impossible, for it to do so.

Part of the problem is that "default" is not a well-understood, bright-line category. The FDCPA does not even define the term. Nor is "default" a term of art with a single accepted meaning in the industry. Despite calls from the FTC to amend the statute to address this gap, Congress has yet to do so. *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-87 & n.5 (2d Cir. 2003) (citing FTC Annual Report: FDCPA, http://www.ftc.gov/os/2001/03/fdcpaar2000.htm (Mar. 2001)).

Absent a statutory definition, courts have thus been left to assess whether a debt is "in default" by considering multiple factors on a case-by-case basis. In *Alibrandi*, for example, the Second Circuit concluded that "default" could take on different meanings depending on context. *Id.* at 86-87. For some types of debt, such as student loans, the court held that federal regulations define when a debt is in default. *Id.* at 87 (citing 34 C.F.R. § 682.200(b) (1998), 7 C.F.R. § 762.141(a) (1999), 12 C.F.R. § 336.3(c) (1999), and 34 C.F.R. § 685.102(b) (1999)). For other debts, such as car loans, creditors and debtors have "considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests." *Id.* at 87 n.5. Whether a debt is in default also may depend on whether there is a forbearance agreement for the particular loan, under which the lender has agreed to postpone legal action and allow a delinquent borrower time to catch up on outstanding

payments. *See Bailey v. Sec. Nat'l Servicing Corp.*, 154 F.3d 384, 387 (7th Cir. 1998). In some circuits, the specifics of "'applicable state law'" may also be relevant to evaluating whether a loan is in default. *De Dios v. Int'l Realty & Invs.*, 641 F.3d 1071, 1074 (9th Cir. 2011) (quoting Fed. Trade Comm'n, Advisory Op. n.2 (Apr. 25, 1989)).

When buyers and sellers transact in sizeable loan portfolios, there is no feasible method to determine which of the debts may be in default. Doing so would require the parties to identify, among other things, whether each account was subject to an applicable federal or state regulation, the terms of the underlying contract for each debt, the status of receipt of payments (which typically changes daily across a portfolio of any size), and the effect of any forbearance agreements. And they would have to do this on an account-by-account basis throughout the portfolio, possibly requiring analysis of the particulars of thousands or even millions of loans.

For all these reasons, when lenders buy and sell credit accounts, some portion of the accounts will be in default at the time of sale, whether or not the purchaser's goal is to purchase defaulted debt. In this case, for example, Santander purchased $3.55 billion in loans, which included both defaulted and non-defaulted debt. Resp't Br. 43; Resp't C.A. Br. 56. In another case, the buyer purchased 128,000 mortgages. *Schlosser v. Fairbanks Capital Corp.*, 323 F.3d 534, 535 (7th Cir. 2003). Ten percent of those were possibly in default at the time of sale, although the facts later

showed that some of those loans were not, in fact, in default. *Ibid.* Other cases are similar. *See Davidson v. Capital One Bank (USA), N.A.*, 797 F.3d 1309, 1311 (11th Cir. 2015) (sale of $28 billion in credit card accounts; $1 billion or roughly 3.5% of which were alleged to be delinquent at the time of sale); *Oppong v. First Union Mortg. Corp.*, 215 F. App'x 114, 118-19 (3d Cir. 2007) (reporting that in a typical three-month period "89, out of 141,597, of the loans that Wells Fargo acquired were in default").

C. Petitioners' Expansive Interpretation Will Harm Consumers Without Any Offsetting Benefit

The stunning implications of petitioners' interpretation of the FDCPA are clear against the backdrop of these market realities. When a financial institution purchases a loan portfolio that includes some loans in default (which will almost always be the case), it could find itself tagged as an FDCPA "debt collector," so long as a plaintiff could convince a court that the institution's collection activities were sufficiently "regular[]," 15 U.S.C. § 1692a(6). And, critically, this designation would apply not just to the lender's activities collecting on debts purchased in default, but to *all* its collection activities, including those for loans the lender itself originated. *See* Pet'rs Br. 53-54. As petitioners put it, once firms qualify as debt collectors based on some subset of activity, they are "debt collectors, full stop." Pet'rs Br. 54. That would mean that virtually every lending institution could be subject to FDCPA liability for virtually every loan it makes.

This cannot possibly be what Congress intended. It would explode the FDCPA's coverage beyond the limited class of debt collection entities Congress targeted to encompass financial institutions collecting on their own loans in the ordinary course of business. Both sound financial management and consumers would pay the price.

If routine purchases of loans on the secondary market also bring along the specter of FDCPA liability, that market will be considerably chilled. Lenders' ability to buy and sell loans to help with liquidity, risk diversity, and satisfaction of capital requirements would become considerably more expensive. *Supra* Section II.A. And the increased cost of lending would force lenders to increase the costs of credit for consumers, reduce the amount of credit they are willing to offer, or both. Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, Mercatus Working Paper 22-23 (Sept. 2015).[9] Empirical studies consistently show that the first parties affected by these changes would be high-risk borrowers, who are generally low-income individuals. *Id.* at 23-24 (collecting studies).

Petitioners' requested extension of the FDCPA's coverage would thus come at a high price. What benefits would there be on the other side of the ledger? Other than for plaintiffs' attorneys, *see infra* Section III, any benefits are nearly impossible to discern.

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[9] *Available at* https://tinyurl.com/zywicki-law-economics.

Banks and other financial institutions are heavily regulated at both the state and federal level, and those regimes already police any abusive conduct related to debt collecting by those institutions. *See* Resp't Br. 41 & n.11 (listing relevant statutes).

At the same time, the "debt buyers" on which petitioners and their amici do focus will remain covered under the FDCPA's principal definition of "debt collector," regardless of the outcome here. Petitioners and their amici are asking the Court to fill a gap that does not exist.

As described by petitioners, entities specifically purchasing defaulted debt generally will fit the first definition of "debt collector"—parties whose "principal purpose" is "the collection of any debts." 15 U.S.C. § 1692a(6). Indeed, when that industry's members have faced actions under the Act, many appear to have conceded that they qualify as "debt collectors." *See* Consent Order, *In re Encore Capital Grp.*, No. 2015-22 (C.F.P.B. Sept. 9, 2015); Consent Order, *In re Portfolio Recovery Assocs.*, No. 2015-23 (C.F.P.B. Sept. 9, 2015); Consent Decree, *United States v. Capital Acquisitions & Mgm't Corp.*, No. 04-cv-50147 (N.D. Ill. Mar. 24, 2004). There is thus no cause to distort the second definition of "debt collector" because the entities petitioners claim to be concerned with may already be covered. *See* Nat'l Consumer Law Ctr. Br. 33 n.10 ("The vast segment of the debt industry that exists solely to purchase and collect debt * * * should remain untouched" by a ruling for respondent.). For that reason, petitioners' concern that parties will simply take title to debt

they collect to avoid FDCPA liability is unfounded. *Contra* Pet'rs Br. 40-42. Petitioners have not shown that courts have had any difficulty identifying when debt owners' principal purpose is debt collecting. *E.g.*, *Fed. Trade Comm'n v. Check Inv'rs, Inc.*, 502 F.3d 159, 172-73 (3d Cir. 2007).

III. PETITIONERS' INTERPRETATION WOULD EMBOLDEN THE COTTAGE INDUSTRY OF FDCPA LITIGATION

The FDCPA already has sparked a firestorm of vexatious litigation. Broadening its reach here would further fan the flames.

1. The Act imposes many technical procedural requirements on debt collectors that make minor violations unavoidable. *See, e.g.*, 15 U.S.C. § 1692g(a) (requiring debt collectors to give detailed notice). Other provisions contain restrictions whose scope of prohibited conduct is far from clear. *See id.* § 1692e (prohibiting collecting methods that are "false, deceptive, or misleading"); *id.* § 1692f (prohibiting methods that are "unfair or unconscionable"). As Justice Kennedy has noted, "[g]iven the complexity of the FDCPA regime, technical violations are likely to be common." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 618 (2010) (Kennedy, J., dissenting) (citations omitted); *see also* Jerry D. Brown, *Painting a Mustache on the Mona Lisa—How Tinkering with the Validation Notice Will Get You Every Time*, 53 Consumer Fin. L.Q. Rep. 42, 42 (1999) (estimating that 90% of all FDCPA claims involve alleged technical notice violations);

Laurie A. Lucas & Alvin C. Harrell, *2000 Update on the Federal Fair Debt Collection Practices Act*, 55 Bus. Law. 1453, 1454 (2000) (reaching similar conclusion).

The Act's requirements can create a damned-if-you-do-damned-if-you-don't situation for even a careful defendant. For example, in *Nero v. Law Office of Sam Streeter, P.L.L.C.*, a plaintiff sued for an alleged violation of Section 1692g, the FDCPA's notice provision. 655 F. Supp. 2d 200, 205 (E.D.N.Y. 2009). She argued that a letter informing her of a debt was deceptive because it told her that she could request verification but did not specify whether the request should be oral or written. *Id.* at 206. She never requested verification, but she did file suit under the FDCPA. *Ibid.* The district court sided with the plaintiff, holding that the letter was deceptive because verification could only be triggered by a written request and the letter should have said that. *Ibid.* Yet in *Jerman*, the underlying district court holding (that this Court did not disturb) was that a defendant was liable for doing just that—sending a notice letter telling a debtor that verification should be requested in writing. 559 U.S. at 579. That was held to be deceptive because written verification was not required. *Ibid.*; *see* Laurie A. Lucas et al., *Say What You Mean: The FDCPA and Problems of Interpretation*, 68 Bus. Law. 659, 666-68 (2012) (discussing other cases).

The Act pairs vague requirements that can lead to such head-spinning results with harsh civil sanctions for violating "*any* provision." 15 U.S.C. § 1692k(a) (emphasis added). It purports to allow an individual to sue

for even harmless technical infractions and receive "such additional damages as the court may allow," up to $1,000. *Id.* § 1692k(a)(2)(A). It explicitly contemplates class-action suits and allows plaintiffs to recover up to "the lesser of $500,000 or 1 per centum of the net worth" of the defendant (on top of actual and statutory damages). *Id.* § 1692k(a)(2)(B). The Act also orders that successful plaintiffs recover their costs and reasonable attorney's fees. *Id.* § 1692k(a)(3).

The amounts for attorney's fees and costs in FDCPA cases often dwarf any damages for actual harm or statutory damages. Indeed, some courts have required an award of attorney's fees even when a plaintiff suffers no harm and the alleged violation is so minor that it does not merit statutory damages. *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989); *see Graziano v. Harrison*, 950 F.2d 107, 113-14 (3d Cir. 1991) (explaining that, regardless of damages, award of attorney's fees is mandatory except "in unusual circumstances"); *Zagorski v. Midwest Billing Servs., Inc.*, 128 F.3d 1164, 1166-67 (7th Cir. 1997) (per curiam) (abuse of discretion to deny attorney's fees after $100 stipulated judgment). *But see Johnson v. Eaton*, 80 F.3d 148, 151-52 (5th Cir. 1996) (attorney's fees not required for technical violation).

It is thus common for FDCPA plaintiffs' attorneys to make out far better than FDCPA plaintiffs. *E.g.*, *Jallo v. Resurgent Capital Servs., L.P.*, No. 4:14-cv-00449, 2017 WL 914291, at *2-3 (E.D. Tex. Mar. 7, 2017) (awarding roughly $30 in damages per class member and $150,000 in attorney's fees); *Norton v.*

Wilshire Credit Corp., 36 F. Supp. 2d 216, 221 (D.N.J. 1999) (awarding nearly $58,000 in costs and fees for a $5,800 judgment); *Clomon v. Jackson*, 988 F.2d 1314, 1322 (2d Cir. 1993) (for letter to recover $9.42 debt, awarding $1,000 statutory damages and over $3,000 in attorney's fees and costs); *Nguyen v. HOVG, LLC*, No. 14-cv-837, 2015 WL 5476254, at *6 (S.D. Cal. Sept. 15, 2015) (awarding $41,350 in fees for $3,002 settlement).

2. The mix of strict yet vague requirements and harsh penalties has created a boom in attorney-driven litigation that benefits only plaintiffs' attorneys. In less than ten years, the number of FDCPA cases filed each year has nearly tripled, from 4,316 cases in 2007 to 11,697 in 2015. Consumer Fin. Prot. Bureau, *Fair Debt Collection Act: CFPB Annual Report 2016* 15 (Mar. 2016) [hereinafter *CFPB 2016 Report*].[10] Excluding prisoner petitions, that means nearly one out of every eight private statutory actions filed in federal district court was brought under the FDCPA. U.S. Courts, *Statistics & Reports*, Table C-2 (Dec. 31, 2015).[11] And plaintiffs' attorneys appear to increasingly be suing banks and similar financial institutions, the paradigmatic *creditors* under the Act. *E.g.*, *Rhodes v. U.S. Bank Nat'l Ass'n*, ___ F. Supp. 3d ___, 2017 WL 770941 (E.D. Pa. Feb. 27, 2017); *Colella v. First Secs. Tr. & Sav. Bank*, No. 15-cv-11829, 2017 WL 467684 (N.D. Ill. Feb. 3, 2017); *Newfield v. City Nat'l Bank, NA*, No.

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[10] *Available at* https://tinyurl.com/cfpb-2016-report.

[11] *Available at* https://tinyurl.com/uscourts-statistics. The report shows 95,989 private statutory cases for 2015, excluding prisoner petitions.

16-cv-3833, 2017 WL 540944 (C.D. Cal. Jan. 27, 2017); *Johnson v. Bank of Am., N.A.*, No. 16-cv-6699L, 2017 WL 372053 (W.D.N.Y. Jan. 26, 2017).

As amicus the Chamber of Commerce recently explained to this Court, there is strong evidence that attorneys, not clients, are driving this boom in FDCPA claims. Br. of the Chamber of Commerce of the United States of Am. as *Amicus Curiae* in Support of Pet'r at 28-29, *Midland Funding, LLC v. Johnson* (No. 16-348) (filed Nov. 21, 2016). An analysis by FDCPA Case Listing Service, LLC, which tracks federal consumer lawsuits, found that just ten law firms represented 23% of the more than 9,500 plaintiffs who brought individual FDCPA and Telephone Consumer Protection Act claims in federal court from January through September 2016. *Ibid.* One attorney even boasts of having personally "litigated over 5,000 individual Plaintiff's cases" using the FDCPA and a similar state law. *See* Law Offices of Todd M. Friedman, P.C., http://www.toddflaw.com/About/Todd-M-Friedman.shtml (last visited Mar. 27, 2017). Such attorney-driven litigation may favor claims based on technical FDCPA violations, as opposed to more fact-specific substantive claims of actual harm, because such suits "often present facts that are readily certifiable as a class action." Matthew R. Bremmer, Note, *The Fair Debt Collection Practices Act: The Need for Reform in the Age of Financial Chaos*, 76 Brook. L. Rev. 1553, 1579 (2011).

Courts have begun to take notice of the problem. As Justice Kennedy discussed at length in *Jerman*, judicial interpretations of the Act have created a

"troubling dynamic of allowing certain actors in the system to spin even good-faith, technical violations of federal law into lucrative litigation, if not for themselves then for the attorneys who conceive of the suit." 559 U.S. at 617. Other judges have made similar observations. *See, e.g., Fed. Home Loan Mortg. Corp. v. Lamar*, 503 F.3d 504, 513-14 (6th Cir. 2007) (criticizing the "cottage industry" of "professional plaintiffs" that profit from the FDCPA (quoting *Jacobson v. Healthcare Fin. Servs., Inc.*, 434 F. Supp. 2d 133, 138-39 (E.D.N.Y. 2006))); *Zavodnick v. Gordon & Weisberg, P.C.*, No. 10-cv-7125, 2012 U.S. Dist. LEXIS 78868, at *2 (E.D. Pa. June 6, 2012) (criticizing one firm's "cut and paste" practice of submitting nearly identical filings in numerous FDCPA cases and then requesting large attorney's fees following settlement).

3. Accepting petitioners' invitation to expand the scope of covered "debt collectors" beyond what the statute plainly authorizes would exacerbate these problems, further driving up the costs of consumer credit. The current boom in attorney-driven litigation already harms the consumers that the FDCPA was designed to protect. The risk of a large damages award and "the complexity of the FDCPA regime" push many defendants to settle despite potentially meritorious defenses. *Jerman*, 559 U.S. at 616, 618 (Kennedy, J., dissenting). Defendants often will conclude that the cost of a small settlement will be less than litigation costs irrespective of the underlying claim's merits. *Ibid.*; Bremmer, *supra*, at 1580-81.

But the cumulative costs of such settlements still drive up the cost of collecting debts, which creditors must ultimately account for when pricing consumer credit. Bremer, *supra*, at 1556. As the FTC found based on a wealth of empirical studies, "greater efficiency in the judicial enforcement of credit contracts results in the greater availability or lower cost of credit." Fed. Trade Comm'n, *The Structure and Practices of the Debt Buying Industry* 11 n.48 (Jan. 2013) (citing studies).[12] And the reverse is true as well—inefficiencies, such as from hyperactive litigation over technical violations related to debt collection, limit the availability of credit and increase its cost. *Ibid.*

This dynamic is bad enough now. But it stands to grow far worse if petitioners prevail here. FDCPA plaintiffs' attorneys would acquire a bevy of new targets—financial institutions engaged in normal financial management practices. The credit markets, and consumers who depend on them, would pay the price.

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[12] *Available at* https://tinyurl.com/structureandpractices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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